

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE APPLICATION OF ED&F MAN
CAPITAL MARKETS LIMITED
FOR AN ORDER PURSUANT TO 28 U.S.C. § 1782
TO CONDUCT DISCOVERY FOR
USE IN FOREIGN PROCEEDINGS

Misc. Case No. _____

***EX PARTE APPLICATION OF ED&F MAN CAPITAL MARKETS LIMITED FOR AN
ORDER TO CONDUCT DISCOVERY FOR USE IN FOREIGN PROCEEDINGS
PURSUANT TO 28 U.S.C. § 1782***

ED&F Man Capital Markets Limited (“Petitioner”), on the basis of the concurrently filed Memorandum of Law, Request for Judicial Notice and Declaration of Peter Whalen, and exhibits thereto¹ (“Whalen Decl.”), and pursuant to 28 U.S.C. § 1782 and Federal Rules of Civil Procedure 26 and 45, respectfully asks this Court to grant the Proposed Order authorizing Petitioner to serve subpoenas for testimony and documents upon Matthew Ryan Olivo (“Olivo”) and Ian McGuinn (“McGuinn”) (collectively, the “Witnesses”).

The requested relief is for the purpose of obtaining discovery for use in a civil proceeding before a foreign tribunal. The discovery is necessary to understand the business relationships between the Witnesses and others, and to obtain information from the Witnesses regarding remittances received during the time that Petitioner was being defrauded. Evidence of remittances arising from a series of fraudulent nickel trades were obtained in discovery from proceedings in Hong Kong and a Section 1782 Order obtained from the United States District Court for the Northern District of California. Tracing exercises demonstrated that some of that money was traceable to the fraud against Petitioner. The Witnesses are not parties to those proceedings, nor does Petitioner currently intend to make the Witnesses parties to its foreign

¹ Pursuant to Fed. R. Civ. P. 5.2(a)(4), Exhibits 1-5 and 7 to the Whalen Decl. have been redacted in part to protect financial account information.

civil proceeding.

This application (“Application”) meets all of the statutory requirements for issuance of an order for the requested discovery under 28 U.S.C. § 1782. *First*, each of the Witnesses resides or can be found in this district because they live and/or work in this district. *Second*, the subpoenas direct each of the Witnesses to provide relevant testimony and produce relevant documents for use in civil proceedings outside the United States. *Third*, Petitioner is an “interested person” within the statute as it seeks information to seek redress for the substantial injuries it has suffered as a result of a sophisticated fraud. *Finally*, all of the discretionary factors the courts are required to consider weigh in favor of granting discovery: the Witnesses are not anticipated to be parties to the foreign proceedings, there is every reason to believe the foreign court will be receptive to information ordered disclosed by a U.S. court, and the discovery is being sought in good faith, is highly relevant to the foreign proceedings, and is neither unduly burdensome nor intrusive. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 262-65 (2004).

Petitioner seeks the requested relief *ex parte*, which is permissible in the Second Circuit and Southern District of New York. *Gushlak v. Gushlak*, 486 Fed. App’x 215, 217 (2d Cir. 2012) (“It is neither uncommon nor improper for district courts to grant applications made pursuant to § 1782 *ex parte*.”); *see also In re Application of Gemeinschaftspraxis Dr. Med. Schottdorf*, No. Civ. M19-88, 2006 WL 3844464, at *6 (S.D.N.Y. Dec. 29, 2006) (denying motion to quash subpoena granted in *ex parte* application for discovery under 28 U.S.C. § 1782); *In re Application of Hill*, No. M19-117, 2005 WL 1330769, at *1 (S.D.N.Y. June 3, 2005).

WHEREFORE, Petitioner respectfully requests that this Court:

- (1) Grant Petitioner’s Application pursuant to 28 U.S.C. § 1782;
- (2) Authorize Petitioner, through undersigned counsel or its agents, to issue, sign, and serve subpoenas upon Matthew Olivo and Ian McGuinn in substantially the same form as attached to the Declaration of Peter Whalen as Exhibits 11-14 to take discovery relating to the issues identified in this Application;
- (3) Direct the Witnesses to comply with such subpoenas in accordance with the Federal

Rules of Civil Procedure and the Rules of this Court.

Dated: August 6, 2019

By: /s/ *Harris R. Wiener* _____

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